No. 12,277

IN THE

United States Court of Appeals

For the Ninth Circuit

LOUISE K. GODFREY,
Appellant,

vs.

JAMES G. SMYTH, United States Collector of Internal Revenue at San Francisco, California,
Appellee.

On Appeal from the United States District Court for the Northern District of California, Southern Division.

APPELLANT'S REPLY BRIEF.

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FOREWORD.

The arguments in the brief for appellee are presented under the heading (BA 13-25) "The insurance proceeds in question were properly included in the gross estate under section 811 of the Internal Revenue Code". Appellant adopts the negative of this heading in replying to the arguments.

1. **THE INSURANCE PROCEEDS IN QUESTION WERE IMPROPERLY INCLUDED IN THE GROSS ESTATE UNDER SECTION 811 OF THE INTERNAL REVENUE CODE.**

Section 811 of the Internal Revenue Code contains a number of subdivisions, paragraphs, and clauses. Appellee contends that the insurance proceeds were properly includible under section 811 (c) as supplemented by section 811 (d) (5) (BA 18), or under section 811 (d) (2) as supplemented by section 811 (d) (5) (BA 19), or under section 811 (g) (BA 14-18).

A demonstration of the unsoundness of appellee's contentions respecting section 811 (g) will also dispose of his contentions respecting section 811 (c) and (d).

Section 811 (g) (1) has reference to the proceeds of life insurance receivable by an executor. (BA, Appx. iii.) That is not our case. Section 811 (g) (2) has reference to the proceeds of life insurance receivable by other beneficiaries. (BA, Appx. iii.) That is our case. Clause (A) of section 811 (g) (2) has reference to policies of life insurance "purchased with premiums, or other consideration, paid directly or indirectly by the decedent, in proportion that the amount so paid by the decedent bears to the total premiums paid for the insurance". (BA, Appx. iii.) But under section 811 (g) (3) "the amount receivable under a policy of insurance transferred, by assignment or otherwise, by the decedent shall not be includible under paragraph (2) (A) if the transfer did not constitute a gift, in whole or in part". (BA, Appx. iv.) Section 811 (g) (2) (A) is therefore inapplicable to this case,

for a "money's worth" transfer and not a gift is here involved. (*In Re Sullivan's Estate,* 9 Cir. 1949, 175 F. 2d 657, 659-660.) Clause (B) of section 811 (g) (2) has reference to policies of life insurance "with respect to which the decedent possessed at his death any of the incidents of ownership, exercisable either alone or in conjunction with any other person". (BA, Appx. iii.) And section 811 (g) (2) further provides that "for the purposes of clause (B) of this paragraph, the term 'incident of ownership' does not include a reversionary interest". (BA, Appx. iv.)

If section 811 (g) is to be applied at all in this case, it is therefore obvious that the proceeds of the insurance in question were improperly included in the gross estate if the insured did not possess at the time of his death an incident of ownership in the policies upon his life, as required by paragraph (2) (B).

Appellant pointed out at pages 16 to 18 of her opening brief that the creation of each life insurance trust was attended by a precedent "money's worth" oral agreement and understanding between the spouses that the insured would maintain the insurance intact for the full amount and that the wife and children should always be and remain the beneficiaries thereunder. The testimony of the wife respecting the oral agreement and understanding was uncontradicted and unimpeached. (R. 128-130.) It was corroborated. (R. 121-127.) It was testimony the District Court was bound to accept as true (*Grace Bros. v. Com. Int. Rev.,* 9 Cir. 1949, 173 F. 2d 170, 174), and did accept as true (Findings Nos. III and VIII, R. 19-20, 22-23).

That an oral agreement and understanding of such character between spouses is binding and enforceable under California law, cannot be doubted. (*United States v. Pierotti,* 9 Cir. 1946, 154 F. 2d 758; *Rogan v. Kammerdiner,* 9 Cir. 1944, 140 F. 2d 569, 570; *Greenwood v. Com. Int. Rev.,* 9 Cir. 1943, 134 F. 2d 914, 919-920; *Estate of Watkins,* 16 Cal. 2d 793, 797, 108 P. 2d 417; *Estate of Raphael,* 91 A.C.A. 1079, 1085-1086, 206 P. 2d 391.) Nor can it be doubted that California law controls on the legal consequence flowing from such oral agreement and understanding. (*In Re Sullivan's Estate,* 9 Cir. 1949, 175 F. 2d 657, 658-659.) That legal consequence under California law was the *immediate* vesting in the wife and children of the sole and unconditional ownership of the insurance and the *immediate* deprivation of any right on the part of the insured to change the beneficiary or assign the policy or borrow on the policy or surrender the policy or cancel the policy. (*Morrison v. Mutual Life Ins. Co.,* 15 Cal. 2d 579, 586-587; *Chilwell v. Chilwell,* 40 Cal. App. 2d 550; *Freitas v. Freitas,* 31 Cal. App. 19, 20.)

Although the District Court correctly found the facts respecting oral agreement and understanding between the spouses, its findings respecting the legal consequence flowing from the facts (R. 19-20, 22-23) were clearly erroneous and therefore to be disregarded on this appeal (*Grace Bros. v. Com. Int. Rev.,* 9 Cir. 1949, 173 F. 2d 170, 174).

A misconception appearing throughout appellee's brief needs correcting. Appellee supposes that appel-

lant is conceding that some interest or ownership of the insured in the insurance survived the oral agreement and understanding between the spouses. Appellee is mistaken. Appellant has not made nor does she make any such concession. In her opening brief she discussed the interests and ownerships of the spouses in the insurance before change by oral agreement and understanding. But she left no doubt as to her position after such change. It was thus summed up at page 18 of her opening brief, and is repeated: "From the foregoing considerations it logically follows that the insured had waived and relinquished all incidents of ownership to the policies upon his life and had transferred them to his wife and children, and that therefore the proceeds of the life insurance policies were not includible in his gross estate for federal estate tax purposes."

The soundness of that position has been additionally demonstrated herein. Includibility of the insurance proceeds in the gross estate of the insured cannot be justified by resort to section 811 (g) of the Internal Revenue Code.

But appellee also resorts to section 811 (c) as supplemented by section 811 (d) (5). (BA 18-19.) The cited parts of the section have reference to transfers intended to take effect in possession or enjoyment at or after the grantor's death or in contemplation of his death. They are inapplicable here, for the very obvious reason that the transfer took effect *immediately*.

And again, appellee resorts to section 811 (d) (2) as supplemented by section 811 (d) (5). (BA 19.) The

cited parts of the section have reference to revocable transfers or irrevocable transfers not made for "money's worth". They, too, are inapplicable here, for the very obvious reason that an irrevocable transfer for "money's worth" is involved.

CONCLUSION.

For the reasons appearing in the opening brief and herein supplemented, appellant again respectfully submits that the judgment appealed from should be reversed with directions to the trial court to enter judgment for appellant.

Dated, San Francisco,
November 7, 1949.

I. M. PECKHAM,
Attorney for Appellant.